NTSB Order No.
EM-65

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 23th day of November 1977.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

CHARLES HARDY OGERON, Appellant.

Docket ME-63

OPINION AND ORDER

Appellant is seeking review of the Commandant's decision affirming the revocation of his merchant mariner's document (No. Z-1288207) under authority of 46 U.S.C. 239b.[1] In the prior action, appellant had appealed to the Commandant (Appealed to the Commandant (Appeal No. 2076) from the initial decision of Administrative Law Judge Thomas E. P. McElligott, rendered after a full evidentiary hearing.[2] Throughout the proceedings, appellant has been represented by counsel.

The law judge found from documentary evidence presented by the Coast Guard that appellant was convicted of a violation of the narcotic drug laws of Texas by a court of record in that state[3] and that he held a seaman's document at the time of his conviction. Under these circumstances, the law judge concluded that he had no discretion to enter a lesser order than revocation. The evidence

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[1]This statute provides that a seaman's document may be revoked after a Coast Guard hearing if, within 10 years prior to the institution of the action, the holder of the document"...has been convicted in a court of record of a violation of the narcotic drug laws of the United States, of the District of Columbia, or any State or territory of the United State, the revocation to be subject to the conviction becoming final...."

[2]Copies of the decisions of the Commandant and the law judge are attached.

[3]The 184th District Court of Harris County. See volume 4A, Vernons Annotated Texas Civil Statutes, Chapter 3, Article 1906.

disclosed that appellant's conviction was for unlawful possession of heroin,[4] to which he pleaded guilty on August 24, 1972, and for which he received a 3-year prison sentence; that execution of the sentence was suspended; and that he was placed on probation for 3 years. Finally, the court records show that appellant was released on May 6, 1974, after completing slightly more than half of his probation and that the court found him entitled to such relief under provisions of the Adult Probation and Parole Law of Texas.[5]

In rebuttal, appellant testified that he had been hitchhiking with an acquaintance when the police approached them on July 3, 1971, and that a packet of heroin was found nearby which led to his arrest. His claim is that the packet belonged to his companion and that he had no prior knowledge that it was in the latter's possession. He also claimed that these factors were not brought out in court, that he had ineffective counsel, and that he was coerced into pleading guilty.

The law judge also heard and considered various character witnesses in appellant's behalf and reviewed certain items of documentary evidence tending to show that he was fully rehabilitated. He nevertheless concluded that revocation was required under precedents of the Commandant, and he thereupon entered that order. The Commandant, on review, found that a release from probation did not affect the finality of the conviction; that revocation was therefore mandatory; and that mitigating factors could only be considered on an application for administrative clemency.[6]

In his brief on appeal, appellant contends that (1) the Texas Adult Probation and Parole Law extinguished his conviction for all purposes within the purview of 46 U.S.C. 239b, and (2) notwithstanding the fact that his conviction may be deemed final, the law judge had discretion to enter a lesser order under the Federal statute and should have exercised it in this case. Counsel for the Commandant has submitted a brief in opposition.

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[4]Article 725b of the Texas Penal Code (repealed August 27, 1973, and replaced by Texas Civ. St. Art. 4476-15§§4.08(b) (2)(J), and 4.04, with respect to the prohibition against the possession of heroin).

[5]Texas Code of Crim. Pro. Art. 42.12§7.

[6]Under 46 CFR 5.13, administrative clemency may be applied for 3 years after the revocation of a seaman's document for a narcotics conviction.

Upon considering of the of the parties' briefs and the entire record, we conclude that the removal of disabilities stemming from appellant's conviction by the court's application of the Texas Adult Probation and Parole Law requires the revocation action to be set aside herein. The Commandant's decision is, therefore, reversed.

The Commandant cites Berman v. United States,[7] for the holding that, "Placing petitioner upon probation did not affect the finality of the judgement. Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgement that has been rendered." However, the Berman was not concerned with the effect of expungement statutes under which the disabilities flowing from a conviction may be removed by the sentencing court, as here, following a satisfactory completion of probation. Thus, in Berman, it was held that "Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subjected to all the disabilities flowing from the judgment."[8]

The issue here is whether, under Texas law, appellant's release from probation under the adult probation law constituted a setting aside of his conviction for all purposes. If so, it would entitled appellant to restoration of his seaman's document under the Commandant's regulation in 46 CFR 5.03-10, which provides in part that:

> "(b) An order of revocation will be rescinded by the Commandant if the seaman submits satisfactory evidence that the court conviction on which the revocation is based has been set aside for all purposes (see §5.20-190(b)). An order of revocation will not be rescinded as the result of the operation of any law providing for the subsequent conditional setting aside or modification of the court conviction, in the nature of the granting of clemency or other relief, after the court conviction has become final.

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[7]Berman v. United States, 302 U.S. 211, 58 S. Ct. 164, 82 L. Ed. 204 (1937).

[8]We note, in this context that the Texas Court in discharging appellant from probation ordered that, "...the defendant be and he is hereby permitted to withdraw his plea of guilty, the indictment against defendant be and the same is hereby dismissed and the Judgment of Conviction be and the same is hereby set aside ad provided by law." (Exhibit 3).

(c) After the conviction has become final within the meaning of paragraph (a) of this section, the conditional setting aside or modification of the conviction will not act as a bar to the subsequent revocation of a seaman's document under Title 46, U.S. Code, section 239b."

The Commandant relied on Garcia-Gonzales v. Immigration and Naturalization Service,[9] which held that a California expungement statute did not affect the finality of the underlying conviction. That case, however, is inapplicable here since the California law contains statutory as well as judicially imposed qualifications on the removal of disabilities flowing from a conviction. Section 1203.4 of the California Penal Code provides that the dismissal of charges after completion of probation, will not permit a person, otherwise eligible, to posses a concealable firearm. Also, in future prosecutions such a probated sentence will be considered on the same basis as any other conviction.[10]

More recently, however, Federal circuit courts, in deciding deportation cases, have considered the application of various state expungement statutes and have been inclined to give them broader effect. In Kolios v. Immigration and Naturalization Service,[11] the court, after considering various mitigating factors, nevertheless determined, "not without some hesitancy," that they were compelled by the strict requirements of the immigration statute to affirm the deportation order notwithstanding the expungenment of the underlying conviction pursuant to the same Texas statute involved in the instant proceeding. A dissenting opinion, however, states,..."While Congress specifically closed off the avenues of pardon and judicial recommendation against deportation to drug offenders, it said nothing about expunctions under state law...Congress has frequently made federal laws dependent on state statutes...[W]e should be reluctant to strain toward uniformity where Congress has clearly countenanced variety through a system which partially relies on state laws...."

In the more recent case of Rehman v. Immigration and Naturalization Service,[12] another circuit, in analyzing a New York

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[9]344 F. 2d 804 (9th Cir. 1965).

[10]For various other judicially imposed restrictions on the release from disabilities under California law, see footnote 3 of the Garcia-Gonzales case.

[11]532 F. 2d 786 (1st Cir. 1976).

[12]544 F. 2d 71 (2nd Cir. 1976).

law which provide for the relief from disabilities after a conviction, held that a person granted such relief has not been convicted for purposes of the deportation statute.[13] The court stated that, "Deportation here would be contrary to the purposes of New York law...§701 [of the New York Correctional Law] is designed to ensure that conviction will not trigger legal consequences from which there is no chance of appeal...Deportation under §1251(a)(11) is of exactly this mandatory character...." Similarly, revocation of appellant's document appears to be contrary to the underlying purposes of the Texas probation statute.

The Commandant also cites Gillespie v. United States Steel Corporation,[14] on the issue of finality of a judgement. That case, however, is inapposite since it dealt with the question of finality in the context of the ripeness of a case for appeal, rather than as a basis upon which to take adverse civil or criminal action against a person. In any event, it appears that the Supreme Court intended the holding to be narrowly construed, based upon the specific facts in that case, by stating"...[O]ur cases long have recognized that whether a ruling is `final'...is frequently so close a question that decision of that issue either way can be supported...and that it is impossible to device a formula to resolve all marginal cases...Because of this difficulty, this Court has held that the requirement of finality be given a `practical rather than a technical construction." Although the Commandant's decision refers to a "federal definition of final,[15] the Gillespie case demonstrates that no such uniform or universally applicable definition exists.

The Texas Adult Probation Law contains broad authority for the removal of all disabilities flowing from a conviction, providing that:

> "...[The] court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be make known to the court should the defendant again be

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[13]8 U.S.C. 1251(a)(11).

[14]379 U.S. 153, 85 S. CT. 308, 13 L. Ed. 2d 199(1964).

[15]C.D. 7.

convicted of any criminal offense."[16]

In comparing the foregoing language with the requirements of 46 CFR 5.03-10 (b) and (c), we conclude that the dismissal of the state charges against appellant following his release from probation was not conditional within the purview of that regulation, notwithstanding the caveat contained in the last clause of the Texas statute. It is apparent that the remaining disability is only a contingent one, and unless or until appellant is again convicted of a criminal offense, his conviction has been set aside for all purposes. No restrictions whatsoever are imposed upon appellant for as long as he is not found guilty of another offense.[17] Furthermore, even if such a contingency were to occur, the use of the prior conviction is discretionary with the court, which may rely upon it only to decide whether to again grant probation, or for assessing the appropriate sanction within the limits otherwise prescribed for the offense.[18] There has also been a long line of judicial precedents establishing, "...[T]he Texas rule is that a suspended or probated sentence is not a final judgment or conviction on which a Court may predicate enhancement...."[19] Consequently, the effect of the conviction has been removed for all present purposes.

We, therefore, conclude that the charges brought herein pursuant to 46 U.S.C. 239b, and the revocation of appellant's document resulting therefrom, are subject to dismissal.[20]

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[16]Texas Code of Crim. Pro. Art. 42.12 §7.

[17]For example, an advisory opinion of the Attorney General of Texas, in commenting on the foregoing statute, indicates that a person discharged pursuant thereto, "...may serve on a jury or vote at an election..." Op. Atty. Gen. 1970, No. M-640.

[18]Texas Code of Crim. Pro. Art. 37.07 §3(a). See, e.g., Davis v. Estelle, 529 F. 2d (5th Cir. 1976); McLerran v. State, 466 S.W. 2d 287 (Tex. Crim. App. 1971); Dean v. State, 481 S.W. 2d 903 (Tex. Crim. App. 1972); and Gaines v. State, 479 S.W. 2d 678 (Tex. Crim. App. 1972).

[19]Davis v. Estelle, 502 F. 2d 523 (5th Cir. 1974). See also White v. State, 171 Tex. Crim. App. 683, 353 S.W. 2d 229 (1961); and Ellis v. State, 134 Tex. Crim. App. 346, 115 S.W. 2d 660 (1938).

[20]In light of our disposition of this case, based upon the foregoing issue, it is not necessary for us to reach appellant's second contention, that the law judge erred in finding he was not

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is granted;

2. The order of the Commandant affirming the law judge's order revoking appellant's merchant mariner's document be and it hereby is reversed and set aside; and

3. Appellant's merchant mariner's document be returned to him upon request.

BAILEY, Acting Chairman, McADAMS, HOGUE, and KING, Members of the Board , concurred in the above opinion and order.

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vested with discretionary authority to order a sanction less than revocation.